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No. 80-463

In the Supreme Court of the United States
OCTOBER TERM, 1980

DOMINION TOOL & DIE COMPANY, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR DOMINION TOOL & DIE COMPANY, INC., PETITIONER

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I

ARGUMENT

The purpose of this Reply is to respond to certain arguments raised in the Respondent's opposing brief.[1] The Respondent contends that "conduct of third persons tends to have less effect upon the voters than similar conduct by employers or unions." (Citation omitted) (Br.6). The Respondent's argument is unduly rigid and static in this regard. Rather, the important consideration is whether the complained-of-conduct rendered a free election impossible. *Home Town Foods, Inc. v. NLRB,* 379 F.2d241 (5th Cir. 1967).

Assuming, *arguendo,* that a "third party conduct rule" does exist, it should be accorded minimal weight especially since the subject threats were not neutralized by disavowals from the union. This lack of a union's disavowal is significant. *Dixon Distributing Co., Inc.,* 204 NLRB No.159 (1973).

The Respondent's brief, (BR. 2-4) is replete with attempts to minimize the adverse impact of threats and acts of violence, on the electorate. By way of example, the Respondent claims that an incident wherein a pro-union employee told an anti-union employee, that the latter would lose his job, if the union got in, is of no consequence. (BR. 3-4). The purported rationale for the Respondent's position is that the Union was without power to effect the threatened employee's job. It is further reasoned that the threatened employee is presumed to be capable of evaluating the lack of authority of the threatening individual to effectuate the threat. This rationale ignores the realities of the situation and opts for a surface analysis. The Court in *Owens-Corning Fiberglas Corp.,* 179 NLRB 219, enforced 435 F.2d 960 (4th Cir. 1970), provides a far better approach in analyzing comparable situations, such as the

[1] "Br." references are to the Respondent's Brief for the National Labor Relations Board in Opposition.

instant. It opined that realistic standards of human conduct must be considered together with the sophistication of the threatened employee in the labor relations area. This was not done, instantly. Of tantamount import is the case law standing for the proposition that it is commonplace for threats to be repeated and circulated amongst the electorate, and therefore the restraining effect of the coercive conduct is not limited to the employes directly involved. *Super Thrift Markets, Inc. t/a Enola Super Thrift,* 233 NLRB No. 66 (1977).

Finally, the Respondent's Brief (Br. 6) asserts that the courts of appeals have uniformly followed the Board's analysis of the appropriate standard for evaluating third party conduct as a basis for setting aside an election. However, Respondent skirts the issue, by its silence, in not addressing the lack of uniform, underlying criteria needed to give meaning and vitality to the general standard applied in cases, such as the instant one.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for a Writ of Certiorari, the Petitioner prays that its Petition be granted.

Respectfully submitted,

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Dated: November 11, 1980